

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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74-1188

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

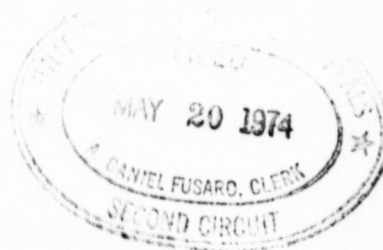
GEORGE CANTON, a/k/a
George Combes,

Appellant.

*On Appeal From The United States
District Court For The Southern
District of New York*

APPELLANT'S APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-v-

INDICTMENT

S 73 Cr. 840 (ELP)

GEORGE CANTON, a/k/a
George Combes, and
RAYMOND SOLOMON,

Defendants.

-----x

COUNT ONE

The Grand Jury charges:

On or about the 9th day of August, 1973, in the Southern District of New York, GEORGE CANTON, a/k/a George Combes and RAYMOND SOLOMON, the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take, from the person and presence of another, certain money, to wit, approximately \$34,610, which belonged to, and was in the care, custody, control, management and possession of, the Chemical Bank, 9 East 167th Street, Bronx, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 9th day of August, 1973, in the Southern District of New York, GEORGE CANTON, a/k/a George Combes and RAYMOND SOLOMON, the defendants, unlawfully, wilfully and knowingly, in committing and in attempting to commit the offense charged in Count One of this indictment, did assault persons, and did put in jeopardy the life of persons by the use of dangerous weapons and devices, to wit, guns.

(Title 18, United States Code, Sections 2113(d) and 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

UNITED STATES OF AMERICA

vs.

73 Cr. 840

GEORGE CANTON

December 6, 1973
10:00 a.m.

(Trial resumed. Present: the defendants and
all counsel.)

(The jury entered the courtroom.)

CHARGE OF THE COURT

EDMUND L. PALMIERI, District Judge.

THE COURT: Ladies and gentlemen, let me add
my own thanks to those already expressed to you by the
attorneys for the close attention that you have paid
throughout the trial.

It has been apparent to me and to them that you
have tried to follow the facts of this case, to understand
the evidence, and to perform your duties conscientiously.

At this point you are about to assume the stu-
pendous burden for which you were sworn, that is, to
determine on the basis of this evidence where the truth
lies and on the basis of that truth, subject to the law
as I charge it, whether there should be a verdict of guilty
or not guilty with respect to either of these two defendants
or either of the two counts with which they are charged.

Now, let me stress at the outset that for reasons of convenience and expediency both Combes and Solomon have been tried together, but in effect you are trying two separate cases.

You have two separate and distinct functions with respect to these defendants and I respectfully suggest that not only should you be careful to consider only the evidence applicable to the case of each one, but you should also be careful to consider each case separately.

Each defendant is entitled to a fair trial, and the verdict, a fair and impartial and just verdict of the jury, twelve jurors, in his respective case.

We should be careful not to allow any kind of fallout or slip-over from one case to the other because of the factual context in this case. Although there are certain pieces of evidence that could be construed to be of significance with respect to both, there are other pieces of evidence that are separate and distinct one from the other and each case from the other.

Now, during the course of my charge I may be referring to the evidence, and my remarks, just as the remarks of the attorneys, may be in error with respect to that evidence.

Please remember that you should rely upon your

1
2 recollection to the exclusion of mine and to the exclusion
3 of the attorneys' recollection. Please attach no special
4 significance to the questions that I have asked during
5 the course of the trial. I have asked those questions not
6 because of any partisan interest but solely because I
7 felt, on the spur of the moment, that the answers to those
8 questions might have been of assistance to you. My
9 questions deserve no more or no less consideration than
10 the questions put by counsel.

11 You should not be affected by any rulings of
12 law, or colloquy that I may have had with counsel, or
13 instructions I may have given to witnesses or counsel.
14 These are all functions that I have to perform to keep
15 the case going along on an even keel, so to speak, and on
16 legal tracks, and they should not and must not be under-
17 stood to impinge in any way upon your exclusive fact finding
18 function.

19 You are the sole triers of the facts. Nothing
20 that I say is intended in any way to impinge upon that
21 exclusive fact finding function.

22 You should be careful not to speculate evidence
23 into the case. Decide the case only on the evidence that
24 you have heard in court, on the testimony, on the exhibits
25 that have been marked in evidence, and on any stipulations

2 made by counsel.

3 The admissible evidence consists of the testimony,
4 the exhibits and ~~concessions~~ or stipulations, and I have
5 already warned you, and I warn you again, that you must
6 be careful not to come to conclusions on the basis of a
7 question that is unanswered, or on a question that is
8 answered negatively.

9 For instance, "Weren't you there? No."

10 The answer is "No." Well, then all you have
11 before you is a question and an answer that was negative.

12 Or sometimes a question is asked with great em-
13 phasis and there's no answer for some reason. Well, that's
14 not proof.

15 Several of you have been taking notes and that's
16 quite all right. I told you at the outset that you could
17 do so. Be careful, however, when you deliberate, to put
18 those notes in your pocket and not use them as an instru-
19 ment of persuasion. They must be used solely as an aid
20 to your own memories.

21 If you have any question with respect to precise
22 statements in the record, you have recourse to that record
23 by asking that the testimony be read to you. That can be
24 done in open court.

25 There's no other way in which testimony can be

made available.

The exhibits, however, are all available to you, and you can ask for them as you choose or as you go along, or, I respectfully suggest that it might be more convenient for you to ask for all the exhibits at the outset and then you will have them before you and you can look at whatever you please.

Now, this is a criminal case, and the burden of proof rests upon the government and never shifts to the defendant. The government has the burden of proving each defendant guilty beyond a reasonable doubt, and each defendant is presumed to be innocent throughout the trial, and throughout your deliberations, until such time, if that time ever comes, when the presumption of innocence is overcome by proof of his guilt beyond a reasonable doubt. This means that the burden on the government to prove each defendant guilty beyond a reasonable doubt is in no way lessened or modified by the fact that the defendant has been indicted and stands formally charged with an offense.

And the assumption of the defendant's innocence must continue throughout the trial and throughout your deliberations until such time, if that time ever comes, when you are convinced of the defendant's guilt beyond a reasonable doubt. In other words, you are writing a

clean slate, and each defendant is assumed to be innocent and until each element of the offense with which he has been charged has been proved beyond a reasonable doubt. If you entertain a reasonable doubt with respect to any essential element of the offense that you are considering, it is your duty to acquit that defendant.

Now, what do we mean by a "reasonable doubt"? The law provides that you may not find the defendant guilty if you have a reasonable doubt about any of the facts necessary to constitute the crime, and a reasonable doubt may be based upon the evidence or the lack of evidence in the case.

A reasonable doubt is such a doubt as would cause a reasonable man to hesitate to act in the more serious and important affairs in life.

Let me pause for a minute to say that during the course of summations by defense counsel, references were made to what I would say and what I wouldn't say in my charge. Please disregard those statements, because in one or two instances the statements were not quite in accord with what I am telling you. In one instance it essentially was directly opposite to what I am telling you, and so I wish you would take the law from me. I am not criticizing counsel. I am sure that they acted in good faith, but

the important thing is to remember that you should accept the instructions with respect to the law from me and only from me.

Now, this talks about the serious and important affairs in life, and I am sure that all of you, in the course of your lives, have had to face important crises, whether or not to submit a loved one to surgery, knowing that there was serious risk of the loss of life; whether or not you should part with a home or an object to which you were closely attached; whether or not you should make certain and important decisions pertaining to your livelihoods, or the education of your children--these and many other instances in life, have forced you to take a position the consequences of which have stayed with you for the rest of your lives.

You must regard your function in this case as another important, another serious step you are taking in your lives.

One of the precious gifts that a jury brings to us is the capacity for fresh and objective judgment. It is quite possible that we, as lawyers, trained in the law, we, as judges, may have lost the sharp edge of our discernment with respect to the ordinary affairs of life. It may be that we are exposed to controversy too much. Perhaps we

1 are exposed to courtroom procedures too much, and so, you
2 come to us as a breath of fresh air in the courtroom. As
3 you are from varying walks of life and varying backgrounds,
4 you are the best measure for the finding of truth that, in
5 our long human experience, we have been able to ascertain
6 and find. And so it is right, it is proper, and I am fully
7 convinced that it is valid that a jury, and only a jury,
8 should find where the truth lies in a controverted issue of
9 fact.
10

11 Now, I told you that a reasonable doubt is such
12 a doubt as would cause a reasonable man to hesitate to act
13 in the more serious and important affairs in life. It is
14 a doubt which a reasonable person has after carefully
15 weighing all the evidence.

16 A reasonable doubt is one which appeals to your
17 reason, your judgment, your common sense, and your exper-
18 ience. "Beyond a reasonable doubt" does not mean to a
19 mathematical certainty or beyond all possible doubt. A
20 reasonable doubt is not caprice, whim or speculation. It
21 is not an excuse to avoid the performance of an unpleasant
22 duty. It is not sympathy for a defendant. Vague, specula-
23 tive of imaginary qualms or misgivings are not reasonable
24 doubts.
25

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2 If, after a fair, impartial and careful con-
3 sideration of all the evidence you are convinced of the guilt
4 of the defendant, you must convict him.

5 If, on the other hand, after such a fair, im-
6 partial and careful consideration of all the evidence you
7 doubt the defendants guilt, you must acquit him.

8 Remember, please, that all of the evidence is
9 before you; all the arguments of counsel are before you.
10 You must consider them.

11 I cannot, in the course of my charge, review
12 every facet of the evidence presented to you in this case,
13 but it is all before you, and the fact that I may not have
14 mentioned a particular item of proof does not indicate that
15 it is a matter for you to disregard. On the contrary,
16 you have the right to believe that there may be some aspect
17 of the case, or some evidence in the case more important than
18 any evidence to which I may have referred.

19 Now, let me read the indictment to you. As I
20 have already stated, the indictment is not proof; it is
21 a procedural device to bring the case to trial, and notice
22 to the accused person of the charge. It consists of two
23 counts, and you will be called upon to render a verdict
24 with respect to each one of these counts, and with respect
25 to each defendant.

Count 1 charges as follows:

"On or about the 9th day of August, 1973, in the Southern District of New York, George Combes and Raymond Solomon, the defendants, unlawfully, wilfully and knowingly, by force and violence, and by intimidation, did take from the person and presence of another, certain money, to wit, approximately \$34,610 which belonged to and was in the care, custody, control, management and possession of the Chemical Bank, 9 East 167th Street, Bronx, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation."

And there is a reference to the law upon which this is based and which I will quote to you in a minute.

I might add, ladies and gentlemen, that you can have a copy of this indictment, and one will be furnished to you so that if it served any convenience for you to look at it during your deliberations, you can have it.

Count 2 reads as follows:

"On or about the 9th day of August, 1973, in the Southern District of New York, George Combes and Raymond Solomon, the defendants, unlawfully, wilfully and knowingly, in committing and attempting to commit the offense charged in Count 1 of this indictment, did assault persons and did put in jeopardy the life of persons by the use of dangerous

weapons and devices, to wit, guns."

Now, the indictment charges each of the defendants, Combes and Solomon, with two crimes: First, the crime of bank robbery; and second, the crime of assault during a bank robbery.

The government contends that George Combes was one of three men who entered the bank and personally committed the crimes of robbery and assault, and that the other two men escaped.

The government further contends that Raymond Solomon waited around the corner in a car, a white station wagon, about which so much has been said in the case, and then drove the three men away, and that Solomon thereby aided and abetted the three men to commit the crimes charged.

Now, I will explain Count 1 first. I will read the bank robbery statute and the aiding and abetting statute, and then I will discuss the essential elements of the first count, that is, the bank robbery count.

Then I will explain Count 2, and that is the assault statute, and I will discuss the essential elements of that.

MR. EATON: Your Honor, I am having difficulty hearing you.

1 THE COURT: Really? I'm sorry.

2 Have any of you had trouble hearing me?

3 JUROR NO. 2: It's a little difficult; yes.

4 THE COURT: Do you think I ought to start over
5 again?

6 JUROR NO. 2: No. I heard you but it's a little
7 difficult.

8 THE COURT: It's not quite as loud as it should
9 be? Oh, please, ladies and gentlemen, don't be timid. If
10 my voice drops or you are not hearing me, it would be very
11 sad if you didn't hear everything I said, so please inter-
12 rupt me and say you can't hear. That is one measure you
13 should take without any hesitation whatever.

14 And thank you, Mr. Eaton, for so advising me.

15 Well, I was just saying that I was going to
16 explain the first count and the statute upon which it is
17 based, and then the second count, which is the assault count
18 or assault charge of committing assault during the course
19 of the robbery, and I have just read the indictment, and
20 you can have a copy of the indictment in the jury room to
21 look at when you are deliberating, so if I didn't read the
22 indictment loud enough, I'm sure you will have a chance to
23 refresh your recollections with respect to that, but I hope
24 you have heard the two very important matters I referred to
25

and that was the burden of proof, the presumption of innocence, and the matter of reasonable doubt; have you all heard those?

All right. Now, Count 1 charges a violation of two federal statutes, the bank robbery statute and the aiding and abetting statute.

The bank robbery statute, known as Title 18, U.S. Code, Section 2113 (a) reads as follows:

"Whoever, by intimidation, takes or attempts to take from the person or presence of another any property or money belonging to or in the care, custody, control, management or possession of any federally insured bank is" and then there is a reference to the crime the penalty for which you are not concerned.

The aiding and abetting statute, Title 18, Section 2, provides as follows:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"Whoever wilfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

Now, what this aiding and abetting statute means

1 is that any person who voluntarily takes an active part
2 in promoting or facilitating the commission of a crime,
3 with knowledge of the unlawful objective, bears the same
4 responsibility under the law as one who directly commits the
5 offense.
6

7 This provision means that if you find the crime
8 was committed, the law makes equally responsible any person
9 who consciously associated with the criminal venture with
10 the intent that his conduct aid its success.

11 Mere presence and guilty knowledge are not enough.
12 You must also be convinced beyond a reasonable doubt that
13 the aider and abetter was doing something, or the alleged
14 aider and abetter was doing something to forward the crime,
15 that he was a participant rather than merely a knowing
16 spectator, and such a person need not have participated in
17 all the transactions which were involved in the commission
18 of the crime.

19 He is equally liable if you find that he commanded,
20 requested, encouraged, provoked or aided another in planning
21 or committing the crime. However, it is essential that he
22 knew of the criminal purpose and intended that his partici-
23 pation aid in its accomplishment.

24 Now, in this case, the government contends that
25 George Combes was in the bank. They contend that George

Combes was one of the three men who actually robbed the bank.

The government contends that Raymond Solomon aided and abetted the three men who were in the bank by serving as a getaway driver.

Now, as counsel for the defense have pointed out to you, and as government counsel has conceded, there was no evidence that Solomon personally took money from the bank. It is enough, however, if you find that some person or persons personally carried out the bank robbery and that the defendant, Solomon, wilfully and knowingly aided, abetted or induced the other persons.

The words "aided and abetted" or "induced" mean that you must be satisfied beyond a reasonable doubt that Solomon wilfully associated himself with the bank robbery and that he wilfully participated in it as something that he wished to bring about, and that he wilfully sought, by his actions, to make it succeed.

The defendant Solomon, by his plea of not guilty, and by the arguments of counsel, has contended that one of the principal witnesses, Joseph Camacho, did not tell the truth and that he should be found not guilty.

Mr. Greenberg, in behalf of Solomon, has contended that Solomon just wasn't there at all and that he

had nothing to do with the robbery or the getaway.

The government must prove that Solomon was serving an active function which in some way aided the persons who actually took the money.

If you are convinced beyond a reasonable doubt that Solomon had agreed with one or more of the robbers that he would wait near the bank in a station wagon to aid their escape, then you would be justified in concluding that one or more of the robbers was relying on what Solomon had agreed to do, and if you do so find, then I instruct you that Solomon's acceptance of this responsibility was an inducement and an encouragement to the robbers, and that Solomon aided, abetted and induced them.

Now, I think that in the circumstances of this case you would be justified in finding--if you believe the witnesses Santiago and Camacho, and if you draw the conclusions which the government asks you to draw from the various pictures in the case--that the white station wagon bearing certain numbers was used, and that the robbers got into this station wagon and because they thought they weren't being followed, went leisurely down a few streets to the point where they were confronted by the police officers, and then, in this vacant field, \$32,000 of the \$34,000 was recovered in two manila envelopes in which the money was

placed was recovered, and several articles of clothing.

Now, I respectfully urge you to scrutinize this evidence very, very carefully, because if you put Solomon inside that bank when this robbery occurred--

MR. EATON: Excuse me, your Honor; I think you misspoke. If you put Combes inside the bank when the robbery occurred.

THE COURT: Yes. I'm sorry. If you put Combes inside that bank when this robbery occurred, or if you put Solomon behind the wheel of that white station wagon, you see that that opens a vista for a great many conclusions and inferences that will take you a long way towards discharging your responsibilities in the case.

The crucial issue in the case isn't whether a robbery occurred. Counsel in the case have not quite but almost conceded that not only was there a bank robbery but there was a very well-thought-out, well-planned bank robbery.

You can see from these pictures--and I am now referring to the Series 4 pictures where you can see the clock and the date, and you can see that it started just a little before 2:15, and it ended just a little after 2:15. Apparently it didn't take more than about two or three minutes for the whole episode to start and finish,

1 and at one point you see Joseph Camacho with his pretty
2 little boy on the teller's desk with these two lady tellers
3 making conversation, and at another point you see a some-
4 what tense atmosphere when the robbery was going on, and
5 you see one of the robbers to the left of Camacho just
6 exactly at 2:15.
7

8 You remember Miss Blanding, the teller. Her
9 testimony was that the first thing she saw or the first
10 thing she knew about the robbery was when she heard a loud
11 thud when one of the robbers landed next to her. She
12 didn't even see him when he was vaulting the counter. So
13 this was a well-planned, well-thought-out robbery.
14

15 \$32,000 were found not too long later in the lot
16 with articles of clothing, and the envelopes which the
17 government contends were directly related to these robbers,
18 and particularly the clothing, to the defendant Combes,
19 so that the crucial issue in the case isn't whether the
20 robbery occurred; it did occur. You would be justified in
21 finding very quickly that it occurred. When I say it did
22 occur, here again I respectfully suggest that I am only
23 repeating what counsel have all said. I think you would be
24 justified in finding it did occur and that it was a well-
25 planned robbery, but the crucial issue is by whom? By
Combes? And when they got away, away from or in this white

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2 station wagon, was it Combes' car? Was he driving them?

3 MR. KRIEGER: I respectfully take exception to
4 that.

5 THE COURT: Was it Solomon's car, and was
6 Solomon driving?

7 Thank you. I stand corrected.

8 The crucial issue is for you to determine whether
9 or not Combes was in that bank, and the crucial issue is
10 for you to determine whether the car was the white station
11 wagon of Solomon and whether Solomon was driving it.

12 Once you have passed those issues, you will have
13 gone a long way in the direction of resolving important
14 responsibilities in your case.

15 The crucial issue, therefore, is the issue of
16 identity; namely, was it a fact that the defendant Solomon
17 was driving a station wagon in the vicinity of the bank.
18 And of course, the issue of identity is the crucial issue
19 in the case against the defendant George Combes since the
20 government contends that he was a principal rather than an
21 aider and abetter.

22 Now, the essential elements with respect to
23 Count 1 are these, and they are the same for each defendant,
24 but you must consider the guilt or innocence of each
25 defendant separately:

(Before you may convict either or both defendants on Count 1, the government must prove four essential elements, each one beyond a reasonable doubt, as to the defendant in question. If there is a reasonable doubt as to any one of these essential elements, the defendant should be acquitted.)

The four essential elements are as follows:

First, that the deposits of the bank were insured by the Federal Deposit Insurance Corporation. The first witness testified to that. There has been no issue raised with respect to it, and I respectfully suggest that you should be able to resolve this issue without any difficulty.

Second, that the defendant took money or aided and abetted somebody to take money which belonged to the bank, or money which was in the care, custody, control, management or possession of the bank, and that the defendant performed these actions on or about August 9, 1973 in the Southern District of New York.

Third, that the defendant took the money from the person or presence of another person by force and violence or by intimidation, or that he aided and abetted somebody to take money in this manner.

And fourth, that the defendant acted wilfully and

1
2 knowingly.

3 I shall now explain these essential elements in
4 further detail.

5 The first element concerning the Federal Deposit
6 Insurance Corporation, I have already referred to.

7 The second element, the government has intro-
8 duced evidence that on August 9, 1973, three men entered
9 a branch of the Chemical Bank located at 9 East 167th
10 Street in the Bronx.

11 I instruct you that all of the Bronx County is
12 located in the Southern District of New York.

13 Furthermore, the government introduced evidence
14 that two of the men jumped over the counters, took approx-
15 imately \$34,000 out of various drawers, and put the money
16 into two folders and left the bank with the third man.

17 The government contends that the defendant George
18 Combes was one of the two men who jumped over the counters
19 and took the money.

20 The defendant Combes denies this by his plea of
21 not guilty and by the arguments of his counsel.

22 The government introduced further evidence
23 that the three men got into a station wagon and it was
24 driven by a fourth man.

25 The government contends that this fourth man, the

driver of the station wagon, was the defendant Raymond Solomon.

Solomon has denied this by his plea of guilty, by his testimony in the case, and by his witnesses. He contends that he was nowhere near the bank that entire day, that he was at Myrna Bonsu's apartment in the northeast Bronx, at a shopping center just above the Westchester County line in Mount Vernon and at the Orchard Beach picnic grounds.

MR. GREENBERG: Excuse me, your Honor. I think you said "by his plea of guilty"; you mean "by his plea of not guilty."

THE COURT: I certainly intended to say that.
....by his plea of not guilty.

Solomon has denied the government's contention by his plea of not guilty and by his testimony and by his witnesses. He contends that he was nowhere near the bank that entire day, that he was at Myrna Bonsu's apartment, at a shopping center, and at Orchard Beach Park.

Now, if you find that the defendant in question took money from the bank or aided and abetted the taking, then you should go on to consider the third element.

The third element concerns the manner in which the money was taken. Was it taken from the presence of

2 one or more persons or was it taken by intimidation?

3 The government introduced evidence that one of the
4 men jumped over the counter at about the mid point of the
5 counter, ordered several tellers to move away from their
6 drawers, and then opened the drawers himself except for
7 one drawer which was locked and which he ordered one of the
8 tellers to unlock.

9 The government contends that this man was the
10 defendant Combes.

11 The government is not required to prove that
12 force and violence were actually used as long as it proves
13 that the money was taken by means of intimidation.

14 The word "intimidation" means that the robber
15 said or did something to any of the tellers that would
16 normally arouse fear in a person.

17 On the issue of intimidation, the test is an
18 objective one. This means that you need not decide whether
19 or not the tellers actually were afraid. Instead, you
20 should decide whether the robber said or did anything to
21 the tellers and, if so, whether this would arouse fear in
22 the average person.

23 I now come to the fourth element, and that is
24 whether the defendant acted wilfully and knowingly.

25 An act is done wilfully if it is done voluntarily

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2 and deliberately and not because of some mistake, accident,
3 negligence or other innocent reason.

4 An act is done knowingly if the defendant knows
5 what he is doing.

6 If you find that the defendant Combes took money
7 from the bank, you must be convinced beyond a reasonable
8 doubt that he knew he was taking it by means of intimidation.

9 If you find that the defendant Solomon served
10 as a getaway driver, you must be convinced beyond a reason-
11 able doubt that he knew in advance that another person or
12 persons were going to take money from the bank by intima-
13 tion and that he knew he was aiding that taking by waiting
14 nearby in the station wagon.

15 In deciding whether a man has acted wilfully and
16 knowingly, you do not have to have a crystal ball to look
17 into the man's mind. You must determine what he intended,
18 and what he knew by considering what he did, and what he
19 said, and all the surrounding circumstances.

20 You should scrutinize carefully the entire conduct
21 of the defendant and the attendant circumstances at or near
22 the time to which the indictment relates.

23 The acts of a man must be set in their time and
24 place so that the meaning of a particular act or conduct
25 may and usually depends upon the circumstances that surround

that act or conduct.

You may draw such inferences as reasonably arise from your consideration of the facts and circumstances bearing on intent which have been put before you and which you accept as true.

You must return a verdict of not guilty, however, unless the government has convinced you beyond a reasonable doubt that the defendant whose case you are considering had the necessary ~~purpose~~ of state of mind.

Now I come to Count 2. That is the assault count. This charges the crime of assault during the bank robbery.

If you find a particular defendant not guilty on Count 1, then you must find that defendant not guilty on Count 2.

However, if you find the defendant guilty on Count 1, you can then go on and should consider Count 2.

I have already read Count 2 to you, and it charges a violation of two federal statutes. One is the aiding and abetting statute which I have already read and explained. The other statute, known as Title 18, Section 2113(d), provides, "Whoever, in committing or in attempting to commit any offense defined in subsection (b)"--that is the robbery statute--"assaults any person, or puts in jeopardy the life

1 of any person by the use of a dangerous weapon, is guilty."
2
3 And then there is a reference to the crime and the penalty.

4 Now, although this indictment speaks in terms of
5 putting in jeopardy the life of persons by the use of
6 dangerous weapons, and although the statute also refers
7 to it, it has been substantially conceded by counsel that
8 this pistol, Government's Exhibit 12, is a pellet gun,
9 and there is some question as to whether a pellet gun can
10 actually kill a person, so that you should disregard any
11 reference to putting in jeopardy the life of persons and
12 consider this to be only as though the indictment charged
13 an assault and as though we were dealing only with that
14 portion of the statute which refers to an assault. In
15 other words, we are eliminating from the case any considera-
16 tion of putting any life in jeopardy.

17 As I said before, you can find a verdict of guilty
18 on the assault count, the second count but you must already
19 have found that the defendant was guilty on Count 1, the
20 bank robbery count.

21 In addition, the government must prove two
22 more essential elements, each beyond a reasonable doubt.
23 The two ~~additional~~ essential elements are as follows:

24 First, that the defendant in question assaulted
25 a person during the robbery or that the defendant in question

aided or abetted, or induced somebody to assault a person during the robbery.

And the second element is that that defendant in question acted wilfully and knowingly.

Of course, there has been evidence in the case that guns were carried by the other two robbers and we just don't know-only palpable examination would reveal-what kind of guns they were. If you believe that evidence, but rather than get into any question of speculation concerning it, as I have already said, it is simpler for you and it is simpler for me to eliminate possible legal error in the case by just excluding the question of putting a life in jeopardy and taking it solely as an assault case.

The word "assault" means a threat to inflict bodily injury, coupled with an apparent present ability to carry out that threat such that an average person would have a reasonable fear that he or she would be subjected to immediate bodily injury.

An assault may be committed without actually inflicting bodily injury, or even touching the victim. However, an assault is something more than the intimidation which was discussed under Count 1. With intimidation the fear can be conditional, that is, a fear of bodily injury if the victim does not obey the robber's commands. However,

with assault, the fear must be unconditional, or at least for a moment of time, that is, a reasonable fear of bodily injury, even if the victim does obey.

Displaying a gun, even if it is this kind of a gun, a pellet gun, and even if it is unloaded, constitutes an assault if, in view of all the circumstances, it would arouse that type of fear in the average person.

It would have made no difference if, for instance, this turned out to be a toy gun incapable of shooting anything provided you find that these essential elements exist.

The government contends that the defendant Combes assaulted several tellers by jumping over the counter, displaying a gun, and commanding them to get away from the bank drawers.

There was no evidence that the defendant Solomon personally assaulted anyone. However, the government contends that he served as a getaway driver and that he aided, abetted and induced all three robbers to commit assaults.

I instruct you that the statute prohibits an assault on any person during a bank robbery, whether it be an employee, a customer, or a person who has just happened to be in the bank.

I shall now explain the second element in more detail, namely, whether the defendant in question acted

1 wilfully and knowingly. Of course, these words have the
2 same meaning that I described when they arose under Count 1,
3 but under Count 2, the action is the alleged assault as
4 opposed to the taking of money, and therefore, before you
5 may convict the defendant Combes on Count 2, you must be
6 convinced that Combes knew that he was displaying a gun
7 and knew that he was putting one or more tellers in fear
8 of bodily injury and that he did so deliberately.

9
10 Before you may convict the defendant Solomon on
11 Count 2 you must be convinced that Solomon knew in advance
12 that one or more of the robbers was going to display a gun
13 in the bank and to put someone in fear of bodily injury,
14 and that knowing this, Solomon deliberately aided, abetted
15 and induced that crime of assault by agreeing to wait
16 nearby and to facilitate the robbers' escape.

17 You have heard a number of witnesses in the case:
18 Herbert Yarkin, the investigator for the Chemical
19 Bank, who testified to the bank audit and to the insurance
20 with the FDIC;

21 Then these two very crucial witnesses, Joseph Cam-
22 acho, who was in the bank when the robbery took place and
23 who ran across the street and left the baby with his wife
24 in the check-cashing office where he worked, and then met
25 the bank guard, Santiago, who was coming back from lunch

and who had the number of the station wagon written on the palm of his hand, and they hailed a gypsy cab and they explained in detail what happened after that.

Josephine Blanding, the teller at the bank, Sergeant Burns, and Ronald Naclerio were in the patrol car that was hailed by Joseph Camacho, and he went along with them when they confronted the robbers, and that's the point at which Camacho has given some crucial testimony.

Thomas Higgins and Lawrence Vierling, and James Green, all police officers from the 44th Precinct in the Bronx, testified.

William Baker, a special agent of the FBI, Richard Liss, the used car dealer who said he was looking through the trailer window at his business waiting for a customer to turn in a white station wagon, and he sees the rear and the right side of the station wagon, also testified, and he testified that it was parked near the fire hydrant for nearly an hour at the time the robbery was taking place.

Robert McCartin, the special agent of the FBI, also testified. You heard his testimony. I think he was called as a rebuttal witness:

The defendant Combes did not take the witness stand. I will say more about that later.

1 emb
2 The defendant Solomon did, and of course his
3 credibility is an issue in the case.

4 Daniel Solomon, his son, and Myrna Bonsu, and
5 Lillian Wilder all testified in his behalf.

6 Now, with respect to each and every one of these
7 witnesses, you must be careful to scrutinize their tes-
8 timony and to determine whether you should accept or reject
9 what they have testified to. That gets to the very core
10 of your function in the case.

11 Consider the inherent probability of what each
12 witness testified to. Consider the demeanor of the witness
13 while on the witness stand. Consider the force and effect
14 of any contradictory statements, the interest of the witness
15 in testifying as he did, and consider above all the quality
16 of the proof.

17 With respect to all of these witnesses, you are
18 the sole judges of their credibility, and you are the sole
19 judges of the weight that should be given to any particular
20 item of proof.

21 Now, the charge has been made in this case that
22 Camacho was lying and that Solomon and Mrs. Bonsu were
23 lying. There have been charges made of possible inaccuracy
24 if not lying on the part of Santiago.

25 What do you do if you find that a witness was

1 guilty of a wilfull falsehood while on the witness stand?
2 Well, you can do one of two things: either you accept that
3 part of the testimony which you consider to be credible
4 and reject the rest of it, or you reject all of it on the
5 ground that all of it is so tainted by the falsehood that
6 none of it is worthy of belief.
7

8 It's like a person eating a fruit which appears
9 to be sound and wholesome, and suddenly discovering an
10 imperfection. Some persons will cut out the imperfection
11 and eat the rest of the fruit, and others will reject the
12 whole fruit, generally, on the basis of whether or not the
13 imperfection is so extensive and has tainted the fruit so
14 much that none of it is worthy of being eaten. And that
15 is pretty much what the law says you can do with the tes-
16 timony of a lying witness.

17 In determining whom you will believe and what
18 weight you will give to the testimony of the witnesses,
19 consider the nature of the evidence given by them, their
20 bias or prejudice if any has been disclosed, their opportu-
21 nity to know and remember the facts about which they testi-
22 fied, their manner and deportment while on the stand, their
23 candor, or frankness, or lack of it, their interest, if
24 any, in the result of this trial, the extent to which they
25 are corroborated or contradicted by other proof, the prob-

abilities as indicated by your common sense and sound judgement that the things asserted in their testimony actually existed or occurred, and such other facts appearing in the evidence as will, in your opinion, aid you in determining the extent to which testimony is worthy of belief.

You should ask yourselves as to each witness what interest or motive that witness may have to testify in a particular manner.

If you determine that any witness has a motive or interest which might lead him to testify falsely, ask yourself, has he done so, or has he told the truth notwithstanding any motive or interest he might have.

Even if you do not doubt the good faith of a witness, you should look out for circumstances which might lead to inaccurate testimony such as faulty memory or inadequate perception.

Throughout this process you will be using your common sense and understanding to assign to the testimony of each witness the value and the weight which best appeals to your sound judgment.

The witness Santiago testified that he wrote the number of a white station wagon on the palm of his hand and that he wrote down the number 389QLR. This number was checked out to be the number of a white station wagon

registered to the defendant Solomon.

Camacho said that one robber had a white jacket and when he later saw him without the jacket, he had on a light blue shirt with a design on it.

Camacho and Santiago hailed a gypsy cab and followed the white station wagon which was driven as though it were not being pursued and at one point the gypsy cab stopped within a very short distance of the station wagon.

Shortly after they separated, Camacho was in a patrol car with the sergeant and the patrolman, and he was present when the robbers were hailed by the police and they ran into the lot.

There was police testimony with respect to the folders, with respect to the recovery of the money, and the like, and the lot in which the articles of clothing were found. You should look at these articles of clothing carefully. You should compare them with the pictures in evidence and with the testimony and decide from this evidence just what conclusions you can come to.

Combes was arrested shortly after in the closet of a barricaded room.

Camacho and Santiago are important witnesses and, depending upon whether you accept or reject all or part of

1
2 their testimony, you will have gone a long way in the
3 direction of resolving the factual disputes in the case.

4 The government seeks to connect Solomon with this
5 robbery by suggesting that the evidence points to him as
6 the driver of the getaway car.

7 Solomon has denied this under oath and no one
8 has identified Solomon as being the driver of the car, but
9 some descriptions have been given.

10 The government points out that Santiago took
11 the number of that car down correctly and while no one has
12 testified to recognizing Solomon as being the driver on
13 the scene, the government suggests that he was there and
14 that his statement or account of what he did at the time
15 was a false, exculpatory explanation.

16 They say that he made an attempt to flee from
17 his house when his house was surrounded by the police
18 later that day. I will have more to say about that later
19 because it is a very hotly disputed issue in the case.

20 All of the evidence is before you, ladies and
21 gentlemen. You should consider it all. You should con-
22 sider the arguments of counsel, and you should come to
23 those conclusions which are dictated by your good judgment
24 and your common sense, and ultimately to conclusions
25 justified under the rules of law as I have charged you.

Was Combes the man in the bank wearing the white jacket and the denim hat? Was he the man wearing the shorts marked in evidence? Was the white station wagon the car of Solomon? Was Solomon at the wheel of the station wagon? Did Combes run through the lot and abandon or lose his white jacket and then barricade himself in the room of a nearby house because he was being hotly pursued and wanted to avoid capture? Did Solomon fabricate the Orchard Beach story testified to by him, his son and Mrs. Bonsu?

The answers to these questions are crucial, and you should make an effort to ask yourselves these questions and to answer them.

Circumstantial evidence is present in this case, indeed, plays a rather important part in the case. Evidence is presented to you as circumstantial whenever you are supplied with facts from which you are asked to deduce that other facts also exist.

You are permitted to resolve disputed questions of fact on the basis of direct evidence, circumstantial evidence, or both.

The testimony of an eye-witness based upon knowledge acquired as a result of actual and personal observation is direct evidence of what the witness observed.

Evidence of facts which allow you, based on your

common experience to deduce or conclude that other facts or events occurred, is termed "circumstantial evidence."

Circumstantial evidence is proper and competent proof. Circumstantial evidence appeals to the common sense and common experience of mankind. These teach us that the known existence of some facts necessarily implies that other facts connected with them exist, and sometimes circumstantial evidence is even more convincing than direct evidence because direct evidence may depend upon the memory or observation and truth of one witness while circumstantial evidence may be based upon the memory, observation and truth of many witnesses who concur and agree, or upon physical facts which cannot be mistaken and cannot speak falsely.

Now, an inference is a term which has been used in the case, and what it means is a process of reasoning familiar to all of us. In a crowded city, particularly, we are making inferences all the time. When we start with a fact or state of facts already proved and deduce as a logical conclusion that some other fact or state of facts also exists, we have made an inference.

If we see a member of our family coming in in the evening with a muffler around his neck and a heavy coat, and wearing gloves, we infer that it is cold outside.

In the course of this trial the possibility of

1 drawing an inference has been presented whenever you have
2 been furnished with facts or propositions from which you
3 have been asked to conclude that a particular event did or
4 did not occur. The decision whether to draw or reject a
5 requested inference rests within your sound judgment.
6

7 You are permitted to arrive at your findings
8 as to disputed questions of fact by inference as well as
9 from any direct proof which may have been offered.

10 Bear in mind that an inference may not be a mere
11 supposition or a random choice between two possibilities.
12 It must be a well-considered conclusion warranted by reason
13 and common sense.

14 In deciding whether or not to draw a possible
15 inference, it is important that you weigh in the balance
16 other possible explanations for the direct facts put in
17 evidence.

18 You should make the inference only if you find
19 that the requested conclusion is the most plausible of all
20 the conceivable alternative conclusions that have occurred
21 to you.

22 There are times when different inferences may be
23 drawn from facts, whether they are proved by direct or cir-
24 cumstantial evidence.

25 The government asks you to draw one set of

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inferences, the defendant asks you to draw another set of inferences. It is for you to decide and for you alone to decide what inferences you should draw.

There has been evidence that the defendant Solomon, after his arrest, made an exculpatory statement, that is, a statement which tended to show that he was innocent. In particular, there was testimony that he said his car couldn't have been used as a getaway car, that he didn't loan it to anybody, and that he parked it in the Orchard Beach parking lot at approximately 2:00 p.m., and that when he walked back to his car, it hadn't been moved from its original position.

In effect, Solomon testified to this when he took the stand.

The government contends that this statement and this testimony were false. Now, if you find that Solomon did make an exculpatory statement and that it was false, then I instruct you that a false exculpatory statement is circumstantial evidence of guilty consciousness and that it has independent probative force against the defendant.

I further instruct you that this alleged statement by Solomon cannot be considered by you in any way against the defendant Combes.

In other words, statements knowingly made and

1 acts knowingly done upon being informed that a crime has
2 been committed, or upon being confronted with a criminal
3 charge may be considered in light of all the other evidence
4 in the case in determining guilt or innocence.
5

6 When a defendant voluntarily and intentionally
7 offers an explanation or makes some statement tending to
8 show his innocence and such explanation or statement is
9 later shown to be false, the jury may consider whether
10 this circumstantial evidence points to a consciousness of
11 guilt.

12 Ordinarily, it is reasonable to infer that an
13 innocent person doesn't usually find it necessary to in-
14 vent or fabricate an explanation or statement tending to
15 establish his innocence, whether or not evidence as to a
16 defendant's voluntary explanation or statement points to
17 a consciousness of guilt and the significance to be attached
18 to any such evidence are matters exclusively within the
19 province of the jury.

20 Solomon has testified that what he told the
21 police in the first instance was true and what he testi-
22 fied here was true. The government says he told a lie in
23 the first place and that he was stuck with that lie and
24 had to repeat that lie in his testimony. You will have to
25 resolve that conflict.

1 emb
2 Now, I come to this very directly contested and
3 hotly disputed question of the attempted escape or the
4 attempted flight, rather, of Solomon as the government
5 suggests.

6 The defendant Solomon denies this, and we are
7 dealing here with an aspect of the case that affects
8 Solomon alone.

9 Now, Solomon testified that on the evening of
10 August 9 when the robbery occurred, he was home with his
11 wife and two children, and you have heard testimony that
12 the house was approached by a sergeant and a number of
13 uniformed policemen. I think there were six or seven in
14 all, plus some FBI agents.

15 There was testimony to the effect that Solomon's
16 wife was on the porch of the house, and there was also
17 testimony that Solomon had been advised by his mother that
18 the law enforcement authorities were interested in his car.

19 Now, the Queens policeman, I think his name is
20 Green, James Green, from the 103rd Precinct, who was one
21 of the policemen on this detail, and he testified, and
22 you have a diagram in evidence indicating the route he took
23 going around to the side door of the house, and he said
24 that while he was standing there on one side of the side
25 door flat against the wall of the house with an FBI agent

on the other side of the door, that there were rapid, heavy treads on some stairs and that the knob moved, not that it was turned but that it moved, and he made that perfectly clear once or twice during his testimony.

Then he said he, in a loud voice, said in words or substance, "If anybody comes out I'm going to shoot."

And then there was a series of heavy rapid steps retreating from the door.

Now, the government says that this adds up to an attempt to flee on the part of Solomon.

Solomon has testified that he was home, that he was the only man in the house, but he never heard this voice, and that he never got near the side door, and his counsel has argued to you that Solomon, having talked to his mother and having seen this parade of police officers approaching the house, could have taken other evasive acts quite successfully and in good time, and that this attempted flight just never occurred.

Now, it is up to you to find out. You have got to try to take up all this evidence, go back to that house on that night and on the basis of this evidence try to reconstruct the facts, and then, on the basis of those facts, ask yourselves, "Was the defendant seeking to flee or escape detection after the commission of a crime which

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2 he knew about or after he was accused of a crime that had
3 been committed or when he was in fear of being accused of
4 a crime that had been committed."

5 That, of course, wouldn't, in and of itself, be
6 sufficient to establish his guilt but would be a circum-
7 stance which you should consider in the light of all the
8 other evidence in the case in determining his guilt or
9 innocence if you find--and I underscore--if you find that
10 the acts did take place as described by the policeman and
11 that other circumstances were indicative that he was, indeed,
12 the person behind that door and who made that attempt to
13 flee.

14 Now, I want to add quickly that flight doesn't
15 necessarily reflect feelings of guilt, nor do feelings of
16 guilt which are present in some innocent persons necessarily
17 reflect actual guilt.

18 Whether or not evidence of flight shows a con-
19 sciousness of guilt and the significance to be attached to
20 any such evidence are matters exclusively within your prov-
21 ince.

22 Now, the government contends, too, that with re-
23 spect to the defendant Combes, he ran away through a vacant
24 lot after being encountered by the two police officers from
25 the patrol car.

1 the witness stand and has testified.
2 Now, if you find that the defendant Combes did
3 flee through that lot after he realized he was being ap-
4 proached by the law enforcement officers, then you may con-
5 sider that as circumstantial evidence of guilty conscious-
6 ness against him and against him only because, there again,
7 that's an aspect of the case that applies only to Combes,
8 the flight through the lot.

9 Now, the defendant George Combes didn't take the
10 stand. The defendant Raymond Solomon did.

11 I instruct you that you are to draw no adverse
12 inferences against the defendant George Combes because of
13 his failure to take the stand.

14 Our constitution guarantees to a defendant the
15 right to remain silent throughout the trial, and you are
16 not to let Combes' exercise of this right influence you in
17 your determination of his guilt or innocence.

18 You should not speculate as to the reasons for
19 Combes' failure to testify nor should you permit this matter
20 to enter into your appraisal of the evidence in any way.

21 Now, with respect to the defendant Raymond Solomon
22 who did testify in his own behalf, having become a witness,
23 his credibility is an issue before you which you must re-
24 solve. The law permits but doesn't require a defendant to
25 testify in his own behalf. The defendant Solomon has taken

the witness stand and has testified.

Now, obviously every defendant has a deep personal interest in the outcome of his case. In view of his interest in the result of the case such interest creates a motive for false testimony. The greater the interest the stronger the motive and the interest of a defendant and the result of his trial is of a character possessed by no other witness.

In appraising his credibility you may take the fact of interest into consideration. However, it by no means follows that simply because a person has a vital interest in the result he is not capable of telling a straightforward or truthful account of events.

It is for you to decide to what extent, if at all, Solomon's interest has affected or colored his testimony.

Now, there have been a few barbs and arrows here about Solomon and Mrs. Bonsu. I don't know whether you got that impression, ladies and gentlemen, or not, but at one or two points in the case it struck me that here is a separated married lady and here is a married man going out with her and so forth. Please don't pass any moral judgment on anybody. We are not here to do that. We are not here to apply any social standards or any moral standards, and I want you to reject any possible impression you may have gotten

1 emb
2 that because Solomon was out with Mrs. Bonsu that day there
3 is something wrong about it or that some bad inferences
4 should be drawn.

5 Actually, she was a co-worker of his in the Bronx
6 hospital.

7 Now, there was a character witness who testified
8 in behalf of the defendant Solomon, Lillian Wilder, the
9 supervisor at the Bronx State Hospital where he works, and
10 what do you do with good character testimony?

11 She said he had a good character for probity and
12 truth and veracity. Good character is to be weighed as a
13 factor in the defendant's favor. You should consider it
14 together with all the facts and circumstances which have
15 been put before you and then give it the weight that you
16 think it is entitled to.

17 A defendant is not entitled to a verdict of
18 acquittal simply because he possessed a good reputation
19 for honesty and veracity before the indictment. However,
20 when considered along with all the other evidence the
21 defendant's reputation, like other factors in his favor,
22 may generate a resonable doubt as to his guilt.

23 If, after considering all the evidence introduced
24 into the case, including the evidence of the defendant's
25 reputation for good character, you have a reasonable doubt

1 emb
2 in your minds, you must acquit the defendant.

3 You should return a verdict of guilty against
4 Solomon only if you are convinced on the basis of all the
5 evidence, including the evidence of Solomon's reputation
6 for good character, that the charge against him has been
7 proved beyond a reasonable doubt.

8 Now, with respect to the penalty, ladies and
9 gentlemen, you should not discuss it, you should not con-
10 sider it, and you must not allow the consideration of
11 any penalty to be imposed upon the defendant in the event
12 of conviction to enter into your deliberations or influence
13 your verdict in any way. This is a heavy duty which
14 rests entirely upon my shoulders. It is a responsibility
15 for the court and is not yours, and you should not allow
16 it to impinge upon your considerations in any way.

17 Your verdict must be unanimous; that is, there
18 must be a unanimous verdict with respect to Count 1, and
19 then, if you consider Count 2 in the event of a verdict
20 of guilty on Count 1, then that verdict should be unanimous
21 too, so that there are separate verdicts with respect to
22 each defendant. And remember to consider only the evidence
23 applicable to each defendant in the case and to consider
24 each defendant's case separately. That unanimity means
25 a consensus, a coming together of your conscientious views

after discussion. It should represent the conscientious determination of each and every one of you.

The essence of your jury function is conscientious listening and conscientious explaining, and that means that each one of you should be anxious and willing to explain your point of view to your fellow jurors. You should be equally anxious and willing to listen to the point of view of your fellow jurors. This should be done calmly, objectively, with a sense of the very heavy responsibility that rests upon your shoulders without fear, without favor, without prejudice, remembering that the only triumph in the case is the triumph of truth. If your verdict is based upon the truth as you find it, subject to the law as I charge you, it is a fair and proper verdict.

I suggest that you start with the facts that are undisputed. There are a number of surrounding facts in this case that are not seriously disputed or that are not disputed at all. Rely upon your recollection of the facts to the exclusion of everyone else.

Now, if, during the course of your consideration, you become confused or concerned about anything that I have said, don't hesitate to ask me for an amplification or clarification of my charge. I will be glad to do it, and I will be at your service throughout your deliberations.

1 emb
2 You should not struggle with legal problems.
3 You should refer them to me. Please do not give yourselves
4 legal advice. That is one of the worst traps a jury can
5 fall into. You must be very careful to avoid giving
6 yourselves legal advice or to permit one of your members
7 to give you legal advice. You should refer these questions
8 to me or any other questions which you believe I can answer
9 to be helpful to you.

10 You must not be swayed by sympathy or emotion.
11 If you allow sympathy or emotion to get in the way, you
12 will, to that extent, be impairing the discharge of your
13 functions.

14 Your verdict should be a verdict of guilty or
15 not guilty with respect to each count and with respect to
16 each defendant.

17 I want to thank the alternate juror for her
18 attendance, and the clerk will instruct Mrs. Caffrey with
19 respect to any further attendance. Mrs. Caffrey, please
20 stay with the jury until they actually retire to the jury
21 room and at that point, before they start deliberating,
22 then you can remove your belongings and you can consider
23 yourself excused.

24 One last bit of advice I can give you, ladies
25 and gentlemen, is to take each episode of the case, because

1 there are numerous episodes in the case which are factually
2 separable from the others, although perhaps linked,
3 depending upon what conclusions you come to. Very often
4 litigated facts in cases are like trying to look at a
5 mosaic. I'm sure many of you have seen these works of
6 art that consist of bits of terra cotta, porcelain, glass,
7 and so forth, of various colors. If you are close to a
8 mosaic, it is a jumble, but if you draw away from it and
9 try to look at it as a whole, the colors and the lines come
10 into some relationship with each other, and you can discern
11 the purpose of the artist, and very often the litigated
12 facts in a case are like trying to look at a mosaic.
13 Try to draw away from it. Look at it as a whole and then
14 pick up each piece of evidence. It's not that you
15 shouldn't look at each portion, each bit of the mosaic, but
16 that in order to understand its purpose and the relationships
17 these bits and pieces can be better understood and better
18 appraised by taking a look at them from a distance, looking
19 at the whole episode as a whole.

21 I must give the attorneys an opportunity to take
22 exceptions or make suggestions.

23 Are there any exceptions on behalf of the
24 defendant Combes?

25 MR. KRIEGER: Yes, sir.

1 emb
2 THE COURT: The defendant Solomon?

3 MR. GREENBERG: Yes, your Honor.

4 THE COURT: All right. Well, then, you better
5 step up. If I see that this takes any time, ladies
6 and gentlemen, I will give you a recess, and if you have
7 a recess, don't discuss the case until I can get back to
8 you.

9 (At the side bar.)

10 (Discussion off the record.)

11 (In open court.)

12 THE COURT: We will take a short recess, ladies
13 and gentlemen.

14 (The jury left the courtroom.)

15 (MR. KRIEGER: Sir, if your Honor please, I
16 respectfully take exception to the following portion of
17 the court's charge:

18 Your Honor stated--and this is to the very best
19 of my recollection--"If you entertain a reasonable doubt
20 as to the elements of the crime, then it is your duty to
21 acquit."

22 I respectfully submit that it is the exact oppos-
23 ite which should be set forth to the jury, namely, that it
24 is the duty of the jury to return a verdict of not guilty
25 unless the prosecution has proven beyond a reasonable doubt

each and every element of the crime charged.)

No. 2, I respectfully submit that your Honor has not properly set forth the defense' contentions. The contention of the defense is basically that there has been no identification of Combes in the bank, leaving the bank, walking on River Avenue, getting in the car, or being in the car.

No. 3, I have never conceded that "This was a well-thought-out plan or robbery." I have made but two concessions throughout this case, your Honor; (1) that a bank was robbed; (2) that the defendant was found cowering in a closet.

I submit that for your Honor simply to state that the crucial issue was whether Combes was in the bank is an undue simplification of the defense.

I submit, your Honor, that the statement to the jury that the government contends that Combes jumped over the shelf did not sufficiently narrate the fact that the defense denies that Combes was in the bank, or that he jumped over the teller's shelf.

I requested your Honor--I dare say most respectfully this might be an inadvertence, but your Honor did not charge that the defense has an absolute right not to call any witnesses on his behalf, and no adverse inference

may be drawn from the failure to call witnesses.

Most respectfully, your Honor--

THE COURT: You never requested me to charge that at any time. I thought that I had carefully covered the government's duty in the case and your right not to call witnesses. I thought that I did that when I talked about burden of proof.

MR. KRIEGER: Well, I had made mention of that at the very outset of the trial in connection with the impanelling of the jurors, your Honor.

THE COURT: Well, then, didn't I comply with your request then?

I will tell them now, if you want me to tell them, that the defendant has a right not to call witnesses, and has a perfect right to remain silent, and that the burden is exclusively on the government.

MR. KRIEGER: Fine. Splendid. The fundamental thrust of the defense, argumentatively, was that there was a conflict as between Camacho and Santiago.

THE COURT: All right. Let me review these things you have requested.

Have you finished?

MR. KRIEGER: No, sir, I haven't.

THE COURT: You've got some more points; all

right. Go ahead and I will tell you what I will do.

MR. KRIEGER: Yes, sir. The thrust of the defendant's position is that there was a conflict as between Camacho and Santiago as to who hailed the gypsy cab.

Your Honor has set forth that Camacho and Santiago hailed the gypsy cab. I believe that that is at variance with the specific exclaimer of Santiago that it was he who hailed the cab.

I believe that the conflict as between Camacho and Santiago is of such a nature that the jury may determine that Camacho was in error and may choose to disregard all of his testimony.

I think that your Honor's illustration as to the unpalpability of the fruit, or the unpalpable fruit, has been, in effect, diminished by the concluding remark that the fundamental consideration is "generally, whether it is eatable."

I think that your Honor, in effect, has set forth that the right of the jury to disregard Camacho's testimony in its entirety, if they find that he lied or made a misstatement of fact in any one aspect, has been diluted by your Honor's remark.

I think that your Honor's statement that the

2 robbers were hailed by the police is an error because
3 there is no proof in the sense that the jury need not
4 deliberate as to whether the individuals who were hailed
5 by the police were, in fact, the individuals who did rob the
6 bank.

7 THE COURT: Well, the \$32,000 then, you suggest,
8 fell like manna from heaven?

9 MR. KRIEGER: I don't know.

10 THE COURT: To me it's such an outrageously
11 preposterous statement for you to say that there was
12 nothing to indicate that the people that the police hailed
13 were somebody else but not the robbers when they found
14 everything in the lot.

15 The crucial question is whether these defendants
16 on trial had anything to do with it. That was the whole
17 thrust of your defense.

18 Now, for the first time, you are raising the
19 issue that you have never suggested to the jury, never
20 put any questions to these witnesses saying that maybe
21 they confronted other people who had \$32,000 to distribute
22 into the lot.

23 MR. KRIEGER: If your Honor please, most respect-
24 fully, I have never conceded and I need not have questioned
25 any police officer. I have never conceded in any fashion--

1 THE COURT: I didn't say you conceded. You
2
3 never raised the issue you are raising with me now.

4 MR. KRIEGER: But I don't have to, your Honor.
5 I don't have to raise every issue. They have to prove
6 the case beyond a reasonable doubt.

7 THE COURT: What did I say that you say is
8 faulty and in error?

9 MR. KRIEGER: Most respectfully, your Honor's
10 statement that the robbers were hailed by the police.

11 THE COURT: All right. I will say it's up
12 to them to determine who they hailed. All right.

13 MR. KRIEGER: Thank you, sir.

14 THE COURT: Wait a minute. I want to tell you
15 what I intend to do so that if I don't do it you will call
16 it to my attention.

17 I think that what I said was that if they
18 entertained a reasonable doubt about any of the elements
19 of fact necessary to dispute the offense, that then it
20 was their duty to acquit the defendant.

21 You except to that; is that right?

22 MR. KRIEGER: Yes, sir.

23 THE COURT: If they have a reasonable doubt
24 about any of the facts necessary to dispute the crime, they
25 should acquit the defendant. You say that that's wrong.

MR. KRIEGER: Yes, your Honor.

THE COURT: I have charged that for years in many cases that have been affirmed by the Court of Appeals. This is the first time anybody has ever found anything wrong with it, so I refuse to change that.)

Now, the defense' contention that Combes was not identified as being in the bank, was not identified at River Avenue getting in the car, being in the car--I will repeat that. I'm sorry if I haven't given the defense' contention, before, the thrust that it deserved. You did not concede the bank robbery was a well-thought-out and planned robbery. You did say indisputably that the robbery occurred, and that's all you said.

MR. KRIEGER: Yes, sir; there is no question about that.

THE COURT: All right, I will say that.

The defendant has the absolute right not to call witnesses. And the burden is exclusively on the government to prove the defendants' guilt beyond a reasonable doubt. I have said that ad nauseum in this case.

All right. I am not going to say that about reasonable doubt but I will say the defendant has an absolute right not to call witnesses.

The thrust of Combes' defense is that there was a conflict

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2 between Camacho and Santiago re hailing the cab and neither
3 one of them is worthy of belief; is that right?

4 MR. KRIEGER: Yes, sir.

5 THE COURT: If I said the police hailed the
6 robbers, I did not intend to imply any conclusion. It is
7 up to them to determine who they hailed and who these
8 persons were. All right.

9 MR. KRIEGER: And lastly, sir, the members of
10 the jury who have taken notes--your Honor has directed
11 them not to look at them. May I request that all notes
12 and any writings of any nature be not taken into the jury room
13 at all?

14 THE COURT: No. I think it would be offensive.
15 Why must I do that? You might ask me to search them to
16 make sure they don't have a gun on them, or a bomb. I
17 am not going to start acting as though I were a policeman with
18 these jurors.

19 I have told them that they should not use these
20 notes as a means of persuasion with other jurors but they
21 can use them as an aid to their own memory only and if
22 there is any conflict with the record, they would have
23 recourse to the court record.

24 MR. KRIEGER: I respectfully except, particularly
25 as to Jurors Nos. 2 and 3, the proofreader and Juror No. 2,

1
2 who have been taking meticulous notes all along and who
3 may very well adopt the attitude of being group leaders
4 of the jury and make no application to the court for
5 guidance with respect to a reading of any transcript.

6 THE COURT: Of course, anything is possible.
7 It may be that a very muscular man, sitting on that jury,
8 would use his muscles to inflict force on the other jurors.

9 Why should I assume that this jury is not going
10 to follow my instructions? If I assume that, then we
11 might just as well call the whole trial off.

12 MR. KRIEGER: Yes, sir. I respectfully except,
13 your Honor.

14 MR. GREENBERG: Your Honor, I except to when your
15 Honor was charging "aider and abetter," referring to Mr.
16 Solomon, when you mentioned Mr. Camacho, and you said
17 that "The lawyers maintain that Mr. Camacho did not tell
18 the truth."

19 I never said that at all, and I would except
20 to your Honor's charging that.

21 THE COURT: I said that you charged Camacho with
22 not telling the truth.

23 MR. GREENBERG: I did not.

24 THE COURT: Did I charge you with attacking him?

25 MR. GREENBERG: I think you did, your Honor. As

I remember it, you were talking about Mr. Solomon, and you said that the lawyers stated or maintained that Mr. Camacho was not telling the truth.

THE COURT: I will say that the attack on Camacho was made only by Mr. Krieger, if that's the case.

I don't recall, now, your summations in that much detail to remember, but if you represent that that is so, and Mr. Krieger has no objection--

MR. KRIEGER: I do have an objection. He had extensive cross-examination of Camacho. The purpose of that is obviously not to build him up. I have no desire to be singled out.

THE COURT: Well, I prefer not to say anything about it.

MR. GREENBERG: My second exception, your Honor, is that in your charging as to the elements of the crime of robbery, I feel that your Honor, prefatory to your charging the elements, was too simple and boiled down the case to just the question of identification. I feel that was improper in the charge. It is important--it is more for the government's summation as to what the issue is. I think that that was an error.

Another exception I take is when your Honor was mentioning all the witnesses, you mentioned the government

1 witnesses, you proceeded to mention Mr. Solomon, and at
2 that particular point you said his credibility is in issue.
3 Then you proceeded to mention the other witnesses of Mr.
4 Solomon, and his was the only name that you singled out
5 to say that his credibility was in issue, and I take
6 exception to that.
7

8 THE COURT: Well, the credibility of every
9 witness is in issue, and I thought I made that plain.

10 MR. GREENBERG: Well, in your Honor's enumeration
11 of the witnesses, probably by inadvertence, you did stop
12 by his name and say that his credibility was in issue.

13 And I except to your Honor's charging of flight
14 as indicative of guilt as to Mr. Solomon.

15 I also except to your Honor's charging false ex-
16 culpatory statements. I don't think that that is proper
17 in this case.

18 Mr. Solomon did, in fact, testify here, and I
19 think that charging false exculpatory statements was not
20 proper, and I therefore except to that.

21 I would just request that your Honor, in charging
22 circumstantial evidence, charge that if two inferences can
23 be made, one more favorable and indicative of innocence than
24 guilt, that the jury should decide in favor of innocence
25 where two inferences can be drawn.

1 THE COURT: Do you agree to the last request,
2
3 Mr. Eaton?

4 MR. EATON: No, your Honor. I think that that
5 was rejected by the Supreme Court in the Holland case
6 around 1954.

7 THE COURT: I'm pretty sure it's not good law
8 in this circuit. I think that the definition I gave is
9 the proper definition.

10 Well, then all I can do for you, Mr. Greenberg,
11 is to just stress the fact that the credibility of every
12 witness in this case is in issue. That's the only thing
13 that you brought up that I feel I should mention.

14 The other matters are matters that are inherent
15 in the fabric of the case.

16 MR. KRIEGER: May I have your Honor's indulgence
17 for just one second?

18 THE COURT: Yes.

19 Mr. Eaton, do you have any exceptions or sugges-
20 tions?

21 MR. EATON: No, your Honor.

22 (Pause.)

23 MR. KRIEGER: We have concluded, your Honor. Mr.
24 Greenberg and I have concluded.

25 THE COURT: All right. Bring in the jury.

(The jury entered the courtroom.)

THE COURT: Ladies and Gentlemen, I do have one or two things that I need to amplify and correct.

Mr. Krieger has asked me to please make it clear that his defense is not quite as simple as I put it.

He said that he has argued before you, and he contends in behalf of the defendant Combes, that there was never any identification of Combes being present in the bank. There was no identification of Combes on River Avenue. There was no identification of Combes getting into the white station wagon or being in that car, and it is entirely up to you, of course, to resolve these contentions and arguments.

As I tried to say at the outset, all of the evidence and all of the arguments are before you. I have not attempted to take any of that away from your consideration, but I didn't want to leave you with the impression that I was giving the defense' arguments short shrift when I referred to them.

Also, Mr. Krieger has pointed out that he at no time conceded that the bank robbery was well-thought-out and planned.

Mr. Greenberg said that, and Mr. Eaton said that. All that Mr. Krieger said was that indisputably

the robbery occurred, or it is undisputed that the robbery occurred. So I again want to apologize to you and to him for having misstated what he said.

Also, Mr. Krieger wants me to charge you, and I do charge you that the defendant has an absolute right not to call any witnesses. He has an absolute right not to take the stand, and I must charge you that you should draw no adverse inferences whatever, either from the defendant's failure to take the stand or from his failure to call witnesses.

The burden is always on the government and it never shifts to the defendant to prove the defendant guilty beyond a reasonable doubt.

Mr. Krieger also asked me to point out that the thrust of Combes' defense also was with respect to Camacho and Santiago, that they contradicted each other and that neither is worthy of belief.

He has also pointed out that at some point in my charge I referred to the incident when the police hailed the robbers or confronted the robbers and that by using the word "robbers" I implied that the people that they confronted were the people who were in the bank.

Now, to that extent, I suppose I was implying a factual conclusion in the case. I don't want to imply

any factual conclusions. They confronted three black men at the time, and that is the evidence before you. It is up to you to take the additional step, if you feel you can take it, that those men who were confronted and who ran through the lot were the robbers. I don't want to take any finding of fact away from you.

It is up to you to determine who these persons were that were confronted by the sergeant and the patrolman in the presence of Camacho, and it is up to you to determine their identities, if you can.

Now, Mr. Greenberg has pointed out that I may have overstressed the fact that the credibility of his client, Raymond Solomon, was in issue.

Obviously, I didn't attempt to overstress that at all. There was something more I had to say about the fact that he was a witness, but the credibility of each and every one of these witnesses is in issue, and it is before you. The credibility of each witness has been put in issue by the defenses in the case, and I charge you that you must determine, and only you can determine it, what evidence you will **accept** and what evidence you will reject, and I thought I made it clear, but I want to emphasize again that the credibility of each witness is before you.

Now, may I again stress that those of you who

1 have taken notes must leave those notes in your pockets
2 and not refer to them any longer now as a means of dis-
3 cussion with your fellow jurors. They have served as an
4 aid to your personal memories and that is all right.
5

6 If you have any questions with respect to what
7 the precise testimony was, you should have recourse to
8 the record, but you can rely upon your own recollection
9 and your own recollection to the exclusion of mine and the
10 exclusion of the attorneys.

11 I think I have said all I need to say, ladies
12 and gentlemen, and you may now retire to consider your
13 verdict.

14 I would suggest that you tell the marshals
15 when you would like to go to lunch, and I will authorize
16 them to take you whenever you choose to do so.

17 All right. Swear the marshals.

18 (A marshal was sworn.)

19 THE COURT: All right. You may retire to con-
20 sider your verdict, ladies and gentlemen.

21 (At 11:35 o'clock a.m. the jury left the court-
22 room.)

23 MR. EATON: Your Honor, I will go up and get a
24 clean copy of the indictment.

25 THE COURT: You have no objection to my omitting

the name from the indictment, do you?

MR. KRIEGER: No, sir. I am deeply appreciative of that, your Honor.

THE COURT: All right, gentlemen. I suppose we will wait to see what their luncheon arrangements will be and then we will have a recess at that time.

MR. KRIEGER: Yes, sir.

THE COURT: Get all the exhibits together, and the indictment.

(Recess.)

(At 4:50 o'clock p.m. the jury entered the courtroom.)

BY THE CLERK:

Q Mr. Foreman, has the jury agreed upon a verdict?

A Yes, we have.

Q How do you find the defendant George Combes on Count 1?

A Guilty.

Q On Count 2?

A Guilty.

Q How do you find the defendant Raymond Solomon on Count 1?

A Guilty.

Q On Count 2?

M.S. V. Canton

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of April, 1974 at No. Foley St. N.Y.C. the within *deponent* upon *M.S. Canton* the *appellee* herein, by delivering a true copy thereof to *h* personally. Deponent knew the person so served to be the person mentioned and described in said papers as the *appellee* therein.

Sworn to before me,

this 15 day of April 1974

William Bailey

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1973

Edward Bailey
Edward Bailey